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APPLICATION OF THE PROCEDURE UNDER THE CHINESE EXCLUSION ACTS TO THE DETERMINATION OF THE RIGHT OF ENTRANCE OF PERSONS OF CHINESE DESCENT ASSERTING AMERICAN CITIZENSHIP.

The utter unreasonableness and gross injustice that is often occasioned by the enforcement of the Chinese Exclusion Acts is most astoundingly impressed upon the American people by the United States Supreme Court in the recent case of United States v. Sing Tuck, 24 Sup. Ct. Rep. 621.

In this case certain persons of Chinese descent, alleging that they were born in this country, and therefore American citizens, were arrested on their return from abroad and detained in a place of confinement. They claimed that they were American citizens, that they were born in this country, and that they should not be treated as aliens. On their petition for release on *habeas corpus* the United States Circuit Court of Appeals for the second circuit held that they were entitled to the benefit of that writ to determine whether they were in fact American citizens. The Court of Appeals very reasonably took the position that the provisions of the Chinese Exclusion Acts were applicable only to Chinese aliens seeking admission to this country but not to those claiming American citizenship. The United States Supreme Court, however, has reversed this decision and holds that the federal courts will not interfere by *habeas corpus* with the refusal of the right of entry into the United States of Chinese persons alleging citizenship.

In an opinion notorious for its puerile argument and vainly concealing an unseemly prejudice against the unfortunate petitioners, whose claim to American citizenship, the opinion relates, "naturally raises a suspicion of fraud," Mr. Justice Holmes delivers a staggering blow to the hitherto unquestioned prestige of American citizenship. In no other country in the world, indeed, would those claiming citizenship in such country be stopped on their return to their fatherland and thrown into prison (sometimes called a house of detention) and be denied any appeal to the courts to establish their claim to citizenship.

Roman citizenship was the highest honor and most inestimable privilege that could be bestowed by the ancient Roman government, No right was more jealously regarded and its *mere assertion* was enough to start in motion every department of the Roman government in favor of him who made the assertion. In some instances Roman citizenship was purchased and in such cases there might have been times when it was necessary to have shown evidences of citizenship, but to have been *free born* was the most princely and most priceless of all distinctions and its mere assertion resulted in instant protection from any proceeding that would be unlawful when a Roman citizen was among those interested or to be affected by the proceeding.

The most prominent illustration of the immediate effect of the assertion of Roman citizenship and one which puts to shame the sordid expediency of the court's argument in the principal case was the incident of St. Paul's arrest in Jerusalem, which is recorded in the twenty-second chapter of the Acts of the Apostles. It seems that on one occasion when St. Paul was in Jerusalem, the chief priests stirred up the Jewish populace against him and in the riot which followed Paul was rescued by the chief captain of the Roman guard. At this point it will be proper to permit the sacred writer to relate the narrative in his own inimitable style:

"24. The chief captain commanded him to be brought into the castle, and bade that he should be examined by scourging; that he might know wherefore they cried so against him. 25. And as they bound him with thongs, Paul said unto the centurion that stood by, Is it lawful for you to scourge a man that is a Roman, and uncondemned? 26. When the centurion heard that, he went and told the chief captain, saying, Take heed what thou doest: for this man is a Roman. 27. Then the chief captain came, and said unto him, Tell me, art thou a Roman? He said, Yea. 28. And the chief captain answered, With a great sum obtained I this freedom. And Paul said, But I was *free born*. 29. Then straightway they departed from him which should have examined him: and the chief captain also was afraid, after he knew that he was a Roman, and because he had bound him.

30. On the morrow, because he would have known the certainty wherefore he was accused of the Jews, he loosed him from his bands, and commanded the chief priests and all their council to appear, and brought Paul down, and set him before them."

Thus it is observed what magic power was in the mere assertion of Roman citizenship. It prevented all the usual proceedings and practices of a Roman guardsman toward aliens and resulted in an instant trial and finally an appeal to Cæsar. Under the decisions of the courts in the principal case, however, it is possible for an American citizen to assert his citizenship in vain, and be excluded from any right of appeal or resort to the courts. It is no argument to say that this rule applies only to American born citizens of Chinese descent. Are there lower and higher degrees of American citizenship, graduated by the esteem in which the particular citizen's ancestry is held by the American people? Paul was a Jew, of a race hateful to the Roman people, and yet the fact that he was born a Roman citizen made him the equal of any other Roman citizen. But we hasten to draw the curtain on the picture of contrast thus presented. American citizenship suffering too much humiliation by the comparison.

To Justices Brewer and Peckham, however, is to be attributed much credit for their eloquent defiance and indictment of the court's opinion in the principal case. Justice Brewer in giving the opinion of the dissenting judges, refers sarcastically to the application of the procedure under the Chinese Exclusion Acts, (which, by the way, he shows to be applicable only to Chinese *aliens*), to the determination of the right of entrance into this country of one claiming American citizenship. He says:

"Can anything be more harsh and arbitrary? Coming into a port of the United States, as these petitioners did into the port of Malone, placed as they were in a house of detention, shut off from communication with friends and counsel, examined before an inspector with no one to advise or counsel, only such witnesses present as the inspector may designate, and, upon an adverse decision, compelled to give notice of appeal within two days, within three days the transcript forwarded to the Commissioner General, and nothing to be considered by him except the testimony obtained in this Star Chamber proceeding. This is called due process of law to protect the rights of an American citizen, and sufficient to prevent inquiry in the courts. But it is said that the applicants did not prove before the immigration officer that they were citizens; that some simply alleged the fact, while others said nothing; that they were told that if they would give the names of two witnesses their testimony would be taken and considered. But what provision of law is there for compelling the attendance of witnesses before such immigration officer or for taking depositions, and of what avail would be an *ex parte* inquiry of such witnesses? Must an American citizen, seeking to return to this, his native land, be compelled to bring with him two witnesses to prove the place of his birth, or else be denied his right to return, and all opportunity of establishing his citizenship in the courts of his country! No such rule is enforced against an American citizen of Anglo-Saxon descent, and if this be, as claimed, a government of laws, and not of men, I do not think it should be enforced against American citizens of Chinese descent."

What stronger or clearer enunciation of sound principle and convincing argument is necessary to uncover the utter fallacy and dangerous doctrine enunciated by the court's opinion in the principal case! But there is no hope for judicial relief; the people themselves must demand of the national legislature the complete rehabilitation of American citizenship on such a high plane that its mere assertion will call into operation every arm of the federal government in support of him who asserts it, any provision in the Chinese Exclusion Acts to the contrary notwithstanding. No nation, indeed, can afford to permit the gratification of its unreasonable, or even reasonable, enmity and prejudice toward a certain race to destroy any of the inalienable rights and inestimable privileges of its citizens.

NOTES ON IMPORTANT DECISIONS.

CONSTITUTIONALITY OF STATUTE FORBIDDING GENERAL DAMAGES FOR LIBEL.—In Hanson v. Krehbiel, 75 Pac. Rep. 1041, the Kansas statute (Gen. St. 1901, ch. 57b), providing that before a civil action for newspaper libel shall be brought plaintiff must serve notice on the defendants, who, if they make retraction in their paper, are to be liable only for actual damages, is held un-

constitutional, as violating Bill of Rights, § 18, guaranteeing a remedy by due course of law to all persons injured in person, reputation, etc. The court says that the effect of the statute is to prevent a recovery of those general damages designed to compensate for "that large and substantial class of injuries arising from injured feelings, mental suffering and anguish, and personal and public humiliation." The suggestion that the retraction required by the act is an adequate substitute for remedy by due course of law, the court declines to entertain.

Courts in two states have passed upon the constitutionality of acts like the one here discussed. In Park v. Detroit Free Press Co., 72 Mich. 560, 40 N. W. Rep. 731, 1 L. R. A. 599, 16 Am. St. Rep. 544, the Supreme Court of Michigan, holding against the constitutionality, says: "We do not think the statute controls the action, or is within the power of constitutional legislation. This will, in our judgment, appear from a statement of its effect if carried out. It purports to confine recovery in certain cases against newspapers to what it calls 'actual damages,' and then defines actual damages to cover only direct pecuniary loss in certain specified ways, and none other. In some of these defined cases the proof of any damages in this sense would be impracticable, and in all it would be very difficult. They are confined to damages in respect to property, business, trade, profession, or occupation. It is safe to say that such losses cannot be the true damage in a very large share of the worst cases of libel. A woman who is slandered in her chastity is, under this law, usually without any redress whatever. A man whose income is from fixed investment or salary or official emolument, or business not depending upon his repute, could lose no money directly unless removed from the title to receive his income by reason of the libel, which could seldom happen. If contradicted soon, there could be practically no risk of this. And the same is true concerning most business losses. The cases must be very rare in which a libel will destroy business profits in such a way that the loss can be directly traced to the mischief. There could never be any loss when employers or customers know or believe the charges unfounded. The statute does not reach cases where a libel has operated to cut off chances of office or employment in the future, or broken up or prevented relationships not capable of an exact money standard, or produced that intangible but fatal influence which suspicion, helped by ill will, spreads beyond recall or reach by apology or retraction. Exploded lies are continually reproduced without the antidote, and no one can measure with any accurate standard the precise amount of evil done or probable. There is no room for holding, in a constitutional system, that private reputation is any more subject to be removed by statute from full legal protection than life, liberty, or property. It is one of those rights necessary to human society that underlie the whole social scheme of civilization. It is a thing which is more easily injured than restored, and where injury is capable of infinite mischief." This case has subsequently been specifically approved by the same court in McGee v. Baumgartner, 121 Mich. 287, 80 N. W. Rep. 21, where the court holds: "The right to recover in an action of libel for damages to reputation cannot be abridged by statute." A contrary view was adopted by a divided court in Allen v. Pioneer Press Co., 40 Minn. 117, 41 N. W. Rep. 936, 3 L. R. A. 532, 12 Am. St. Rep. 797, In criticising this last mentioned case the court in the principal case said: "The conclusion of the court in this case is based largely upon the reasoning that the retraction being required, as it is, to be published as widely and to substantially the same readers as the original, is usually a more complete redress for the injury inflicted than would be a judgment for damages. This, however, is merely an assumption, and may or may not be true; but, even if true, this would not be 'remedy by due course of law,' as contemplated in the constitution, as we have already determined. We are well persuaded that the criticised act takes from the libeled person the right of remedy by due course of law for an injury suffered in his reputation, and hence is invalid under the quoted constitutional provision."

CONSTITUTIONAL LAW—VALIDITY OF JOHNSON GRASS STATUTE AS DISCRIMINATING AGAINST RAILWAY COMPANIES.—Johnson grass or Russian thistle as it is sometimes called, is a most inveterate enemy of the farmer and most difficult to eradicate after it decides to take up its abode in any particular locality. This grass has been the subject of much legislative regulation, a most prominent example of which is the Texas statute providing for a penalty in favor of contiguous farm owners for railroad companies for permitting such grass or thistle to go to seed upon their right of way. This statute has just engrossed the serious attention of the United States Supreme Court, and by a division of the judges thereof held constitutional. Missouri, Kansas & Texas R.R. v. May, 24 Sup. Ct. Rep. 638. Mr. Justice Holmes, writing the opinion, says:

"It is admitted that Johnson grass is a menace to crops, that it is propagated only by seed, and that a general regulation of it for the protection of farming would be valid. It is admitted, also, that legislation may be directed against a class when any fair ground for the discrimination exists. But it is said that this particular subjection of railroad companies to a liability not imposed on other owners of land on which Johnson grass may grow is so arbitrary as to amount to a denial of the equal protection of the laws. There is no dispute about genera principles. The question is whether this case lies on one side or the other of a line which has to be worked out between cases differing only in

degree. With regard to the manner in which such a question should be approached, it is obvious that the legislature is the only judge of the policy of a proposed discrimination. The principle is similar to that which is established with regard to a decision of Congress that certain means are necessary and proper to carry out one of its express powers. McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579. When a state legislature has declared that, in its opinion, policy requires a certain measure, its action should not be disturbed by the courts under the fourteenth amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.

Approaching the question in this way we feel unable to say that the law before us may not have been justified by local conditions. It would have been more obviously fair to extend the regulation at least to highways. But it may have been found for all that we know, that the seed of Johnson grass is dropped from the cars in such quantities as to cause special trouble. It may be that the neglected strips occupied by railroads afford a ground where noxious weeds especially flourish, and that whereas self-interest leads the owners of farms to keep down pests, the railroad companies have done nothing in a matter which concerns their neighbors only. Other reasons may be imagined. Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people is quite as great a degree as the courts."

Justice Brown levels a vigorous dissent at the opinion of the court in the principal case. Justice Brown said: "In this case the railway is not pursued as such, but merely as the proprietor of certain land alongside its track, and no reason can be conjectured why an obnoxious form of weed growing upon its land, should be more detrimental than the same weed growing upon adjoining lands. The railway is not made the sole object of the statutory prohibition by reason of the fact that it is a railway, and the discrimination against it seems to be purely arbitrary. The only distinction suggested in support of the ordinance is that the seed of Johnson grass may be dropped from the cars in such quantities as to cause special trouble; but there is not only no evidence of such fact, but it is highly improbable that the seed of a noxious grass of this kind would be carried upon the cars at all. It is also suggested that the self-interest of owners of farms to keep down pests of this kind might be relied upon to prevent their growth. But this tends merely to show that if the law were made general, it would be more readily obeyed by private land proprietors than by the railway. It may be that railways are less given to the observance of precautions required of them as neighborhood land owners than the proprietors of individual property, but that does not create a distinction in principle. It merely tends to show that if the law were made general the railway companies would be oftener prosecuted than other proprietors. If Johnson grass growing upon railway tracks be a nuisance, it is equally so when growing upon the other side of the line fence, and I think the law should be made general, to avoid the charge of an arbitary discrimination. If the land owned by every corporation were held to this liability, while the land of individuals were exempt, the discrimination would be more conspicuously unjust in its appearance, but scarcely more so in its reality."

WHEN AND IN WHAT CASES WILL A REPRESENTATION AS TO THE VALUE OF REAL OR PERSONAL PROPERTY BE SUFFICIENT TO PREDICATE AN ACTION FOR FRAUD.

The general rule is that representations as to the value of the subject matter of a sale are not sufficient to predicate an action for fraud.[1]

[1] Ellis v. Andrews, 56 N. Y. 83, 15 Am. Rep. 379; Cronk v. Cole, 10 Ind. 485, involving a representation of the market value of barley; New Brunswick R. Co. v. Congbeare, 9 H. L. Cas. 711, involving exaggerated statements of the profits of a company; Hunter v. McLaughlin, 43 Ind. 38, value of a patented invention. Gordon v. Butler, 105 U. S. 553, a mistaken estimate upon one's best judgment of the value of land gives no action; Crown v. Carriger, 66 Ala. 590; Anderson v. McPike, 86 Mo. 293; Fulton v. Hood, 34 Pa. St. 365; Brown v. Leach, 107 Mass. 364; Cromer v. Perkins, 124 Mass. 431; Wolcott v. Mount, 38 N. J. L 496, 499; Merrian v. Arbuckle, 81 Ill. 501; Righter v. Roller, 31 Ark. 170; Holbrook v. Conner, 60 Me. 578; Wilkinson v. Clauson, 29 Minn. 91; Bishop v. Small, 63 Me. 12; exaggerated praise is not actionable, Columbia Electric Co. v. Dixon, 46 Minn. 463, 49 N. W. Rep. 244; Directors v. Kisch, L. R. 2 H. L. 99; "dealers' talk," Demming v. Darling, 148 Mass. 504, 505, 20 N. E. Rep. 107; Story, Sales (2d Ed.), secs. 360, 361; Nash v. Trust Co., 34 N. E. Rep. 625; Chase v. Boughton, 54 N. W. Rep. 44, representations as to prospective dividends on certain stock; Robertson v. Parks, 76 Md. 118, 24 Atl. Rep. 411; Totten v. Burhans, 91 Mich. 495, 51 N. W. Rep. 1119. But to represent that stock had paid a specified rate of dividends at prior times has been held to be a statement of a fact, Haudy v. Waldron (R. I.), 29 Atl. Rep. 143, and to same effect, in substance, are: Crane v. Elder (Kan.), 29 Pac. Rep. 151; Childs v. Merrill (Vt.), 22 Atl. Rep. 626; Winston v. Young (Minn.), 49 N. W. Rep. 521; Griffen v. Farrier (Minn.), 21 N. W. Rep. 553; Cruess v. Fessler, 31 Cal. 336. But a purchase of stock from a stockholder at a low price, by an officer of the corporation, is not fraudulent because such officer has knowledge, in his official capacity, of favorable sales of other stock, which enhanced the value of stock generally, and of which fact the seller was ignorant, Crowell v. Jackson, 53 N. J. L. 656, 23 Atl. Rep. 426.

Statements purporting to be mere opinions or expressions of judgment are not such affirmations of facts as warrant another to rely thereon. A representation in order to make the foundation for a recovery in an action for fraud or deceit, must relate to alleged facts, and facts which substantially affect or injure the interests of the complaining party.[2] If the representation is in reality an "opinion," or mental calculation such as a judgment, or is a matter of "expectation or probability,"[3] or a matter of "conjecture,"[4] fraud cannot be predicated thereon. "Dealers' talk" and such commendations of wares and merchandise commonly indulged in by merchants and salesmen, generally come within the classification of opinions.[5] Such phrases as "worth so much" and similar commendations resorted to by merchants are treated as mere opinions, and as said by Holmes, J., in Demming v. Darling,[6] such representations "manifestly are open to difference of opinion, which do not imply untrue assertions concerning matters of direct observation, and as to which it has always been understood the world over that such statements are to be distrusted," and are not actionable. While the law seeks to repress dishonesty, it will not put a premium on slothfulness or on a lack of diligence, but justly presumes that the average man will exercise vigilance and discretion in making contracts and dealing with others. As said by the Supreme Court of Indiana: "If any one relies on mere opinion, instead of ascertaining facts, it is his own folly."[7] The maxim *Vigilantibus et non dormientibus succurant jura*, and the doctrine of *caveat emptor* are adhered to in the application of this rule.

Opinions are frequently influenced by "whim and caprice." The zealous merchant may indulge in extravagant praise of his goods, and make emphatic and positive statements as to the values of his wares, knowing that his statements are false, and yet not come within the definition of fraud. Men of keen business habits, in order to effect advantageous and profitable contracts, may misrepresent with impunity the value of a commodity upon the market, where opportunities for inquiry are open to the buyer, and the latter may exercise his own judgment without restriction. However justly the moralist may censure the address sometimes resorted to by enterprising and aggressive vendors, yet they are not, in legal contemplation, guilty of fraud.[8] Opinions and judgments are matters concerning which, as Judge Cooley said: "Many men will be of many minds."[9] While this rule may in some instances work hardship, yet to establish a contrary doctrine would open the door for a multiplicity of actions based upon the most subtle and simulated charges of fraud and deceit. The general rule, however, is subject to exceptions and the application of the rule is modified in a number of instances. Persons may be dealing in fiduciary relations;[10] representations may be made concerning matters within the exclusive knowledge of the party making them;[11] representations may be made under such peculiar conditions or special circumstances as to disarm vigilance.[12]

The rule of *caveat emptor* does not apply when the seller induces a purchase on certain terms by willfully misrepresenting material points.[13] It is also a rule of law to protect the weak and credulous against the strong and artful, and the inexperienced and unsuspecting against the wiles and snares of the unscrupulous.[14] The feeble and the igno-

[2] See Jaggard on Torts, Vol. 1, p. 578.

[3] Long v. Woodman, 58 Me. 49; Pedrick v. Porter, 5 Allen, 324; Hazard v. Irwin, 18 Pick. (Mass.) 95.

[4] Hedin v. Minneapolis Medical & Surgical Inst., 64 N. W. Rep. 158, 159.

[5] Com. v. Jackson, 132 Mass. 16; Ellis v. Andrews, 56 N. Y. Supp. 83; Bishop v. Small, 64 Me. 12. See, also, Benj. Sales (4th Am. Ed.), sec. 430; Demming v. Darling, 148 Mass. 504, 505, 20 N. E. Rep. 107; 8 Am. & Eng. Ency. of Law (1st Ed.), p. 809, and cases cited in notes 7 and 8; Cooper v. Lovering, 106 Mass. 77.

[6] 148 Mass. 504, 505, 20 N. E. Rep. 107.

Seiveking v. Litzler, 31 Ind. 13.

[8] Foley v. Cowgill, 5 Blackford (Ind.), 18. To the same effect is Cronk v. Cole, 10 Ind. 485.

[9] Cooley on Torts (2d Ed.), p. 565.

[10] Fisher v. Budlong, 10 R. I. 525; Cooley on Torts (2d Ed.), p. 566, note 1, 2, also p. 567 of Cooley on Torts, same edition, and note 3.

[11] Hedin v. Minneapolis Medical & Surgical Inst., 64 N. W. Rep. 158; Gordon v. Butler, 105 U. S. 553; Eaton v. Winnie, 20 Mich. 156; Hicks v. Stevens, 121 Ill. 186, 11 N. E. Rep. 241.

[12] See Stewart v. Stearns, 63 N. H. 99, where the buyer, having equal information, was induced to forego inquiry and relied on the seller's statement of value. To the same effect are, Bradbury v. Haines, 60 N. H. 123; Hanger v. Evans, 38 Ark. 334; Grim v. Byrd, 32 Grat. 293.

[13] See, 8 Am. & Eng. Ency. of Law, p. 811.

[14] See, 2 Bishop's Crim. Law (7th Ed.), secs. 433

rant are as much within the shelter and care of the law as the astute and sagacious.[15] The best illustration of the protection of the weak is to be found in the application of the criminal law under the head of false pretenses. It must be conceded that that principle of protection is recognized to a much greater extent in the law of crimes than in litigation involving civil rights, and cannot be taken as governing the latter. But a brief reference to the criminal law in this particular will be of benefit in discerning and appreciating the logic of the authorities which recognize that in some cases false representations as to value may be sufficient to constitute fraud in an action for damages. In England, the rule is firmly established that any pretense or false representation by word or token, which overreaches the prudent or deceives the credulous, and thereby works a wrong, is sufficient to sustain an indictment for false pretenses; and this rule is adhered to irrespective of whether the methods and representations complained of would have misled a person of ordinary prudence or not.[16] The same doctrine is upheld in Arkansas, Iowa, Michigan, Missouri, Texas, New York, Maine, Mississippi, Tennessee, Pennsylvania and Ohio.[17] This doctrine is important for the reason that a great many authorities have maintained that in order to support an indictment for false pretenses, the representations must be such as would deceive a person of "ordinary intelligence and prudence."[18] The English cases proceed upon the theory that the law is not only for the protection of the strong and prudent who may be defrauded by the misrepresentations of others, but that it has regard for the weak and unwary as well.[19] In this country the weight of authority maintains that "the design of the law is to protect the weak and credulous from the wiles and stratagems of the artful and cunning and, as well as those whose vigilance and sagacity enable them to protect themselves."[20]

It is proper to remark, however, that the principle which has for its conception and purpose the protection of the weak is not recognized or applied in civil actions to the extent that it is in criminal prosecutions. A great many cases occur where the aggrieved party may successfully prosecute his wrongdoer on account of false pretenses and at the same time be unable to recover in a civil action the rights he has lost or damages therefor. But there are a great many cases where relief may be obtained. If the buyer has not equal means of knowledge, or having such is induced to forego inquiry and relies upon the seller's statements of value, they are binding.[21] Where one is purchasing goods, the value of which can only be known to experts and is relying upon the vendor who is a dealer in such goods, to give him accurate information concerning them, an action for fraud may arise.[22] There is a multitude of cases which hold that an action may be sustained for false representations as to the price paid by a third person for the property which is the subject

436; Lefler v. State, 153 Ind. 82, 83 and 87; 2 Wharton's Criminal Law (10th Ed.), secs. 1188, 1192.

[15] Smith v. State, 55 Miss. 313, 17 Am. L. Reg. (N. S.) 525; McKee v. State, 111 Ind. 378, 381.

[16] 2 Russell on Crimes (9 Am. Ed.), 619, 700; Reg. v. Woolev, 1 Den. C. C. 559, 4 Cox C. C. 193, 3 C. & K. 98, 2 East P. C. 8 pp. 827, 831; Reg. v. Giles, L. & C. 502, 10 Cox, C. C. 44; Reg. v. Jessop, Dears & B. 442, 7 Cox C. C. 399. These authorities are collated in Lefler v. State, 153 Ind. 82, in which case the Supreme Court of Indiana overthrew and expressly overruled all former decisions of that court which held that such a representation must be one which would deceive a person of ordinary prudence.

[17] Johnson v. State, 36 Ark. 242; State v. Fooks, 65 Iowa, 196, 452, 21 N. W. Rep. 561, 773; State v. Montgomery, 56 Iowa, 195, 9 N.W.Rep. 120; People v. Pray, 1 Mich. N. P. 69; State v. Williams, 12 Mo. App. 415; Colbert v. State, 1 Tex. App. 314; *In re* Greenough, 31 Vt. 279, 290; Watson v. People, 87 N. Y. 561, 41 Am. Rep. 397; People v. Cole, 20 N. Y. Supp. 505; People v. Rice, 128 N. Y. 649, 29 N. E. Rep. 146; State v. Mills, 17 Me. 211; Smith v. State, 55 Miss. 513; Watson v. State, 16 Lea. (Tenn.) 604; Commonwealth v. Henry, 22 Pa. St. 253; Thomas v. People, 113 Ill. 531; Bartlett v. State, 28 Ohio St. 669, 670.

[18] See 9 Ohio S. & C. P. Dec. 825; obtaining money by mere lying is not actionable, See Co. v. Warren, 6 Mass. 72; State v. Simpson, 10 N. Car. 620; Com. v. Baker, 8 Phila. 613; Chapman v. State, 2 Head. 36; but see State v. Reiff, 14 Wash. 664, 45 Pac. Rep. 318, holding that a naked lie would be sufficient, and that the false pretense need not be in the nature of a token or writing, etc. See Roscoe Criminal Evidence, 465, *et seq;* 11 Wend. 557; 3 Hill, 169; 19 Pick. 186; 50 Ind. 473, 477; State v. Magee, 11 Ind. 154; Leobold v. State, 33 Ind. 484. The Indiana cases cited in this note were expressly overruled in Lefler v. State, 153 Ind. 82, 87 and 89.

[19] Young v. Reg., 3. T. R. 98, Kenyon C. J.

[20] McKee v. State, 111 Ind. 378, 381; Smith v. State, 55 Miss. 313; Lefler v. State, 153 Ind. 82, 86, and numerous cases there cited. See also authorities collected in note 17 hereof.

[21] Stewart v. Stearns, 63 N. H. 99. See Collins v. Jackson, 54 Mich. 186, 19 N. W. Rep. 947.

[22] Pickard v. McCormick, 11 Mich. 68; Kost v. Bender, 26 Mich. 515; Pike v. Fay, 101 Mass. 134.

of the negotiations.[23] Representations of price paid for an article are not actionable if parties are dealing at arms' length. It might be otherwise, if confidential relations exist. Where the vendor and vendee are dealing at arms' length with each other, the representations of the former as to the cost of his property, even though false and made with the view to deceive, will furnish no ground of action. They are looked upon merely as representations in regard to value uttered for the purpose of enhancing the price and any purchaser who relies upon them is considered as too careless of his own interests to be entitled to relief.[24] "This rule, however, does not apply where any fiduciary relation exists between the vendor and the vendee, or where the property, in regard to the cost of which the vendor makes a false statement, has been bought by him upon the joint account of himself and his vendee. In such cases, a misrepresentation as to the price paid will give a right of action to the deceived party."[25] So it has been said that the purchaser of a mill who is ignorant of the business has a right to rely upon the positive assertions of the seller as to the business the mill is capable of performing.[26] So where a dealer in patent rights sold certain territory to one who was ignorant of its value, representing it to be very valuable, when he knew it was not, an action for fraud was maintained and recognized.[27] Where land is situated in another state at a considerable distance and the prospective vendee for that reason is unable to examine the land and ascertain its character and value, he may be warranted in relying upon the representations of the vendor concerning the value of the improvements, nature and quantity of crops produced in the past and the consequent value of the land.[28] The theory of these cases is that whenever a sale of property not present, but at a remote distance is made, and the seller knows that the purchaser has never seen the same and is relying upon the representations of the vendor, as to the character, condition and subsequent value of the land, such representations are treated as constituting in effect a warranty that the seller will make his representations good.[29]

While these authorities modify the doctrine of *caveat emptor*, yet from the language and reasoning employed, it is apparent that the same authorities place representations of value, with reference to distant property, under the same head as representations concerning property that is present, and that in order that representations as to value of distant property may constitute actionable fraud, there should be coupled therewith representations as to the character and condition of such distant property, commensurate with the represented value. Supporting this line of reasoning, is the case of Home v. Perkins,[30] where it was held that where expressions of opinion as to the value are not fraudulent, yet, misrepresentations of facts which throw light upon value, are fraudulent. So that if in connection with the representations of value, additional representations are made pertaining to matters which give credence and support to the pretended value, the foundation for an actionable fraud may be laid. There is another line of authorities, which maintain that a fraudulent recommendation of another's financial standing or ability may be sufficient to support an action for dam-

[23] Medbury v. Watson, 6 Metc. (Mass.) 246; Ives v. Carter, 24 Conn. 403; Somers v. Richards, 46 Ver. 170; Sanford v. Nandy, 23 Wend. (N. Y.) 269; Kenner v. Harding, 85 Ill. 264; McClelland v. Scott, 24 Wis. 81. See also 8 Volume of the American and English Ency. of Law (1st. Ed.), page 810, where it is said: "Among false statements affecting value which have yet been held fraudulent, are those that a patent had been largely sold and was profitable; that certain persons named had made purchases of other stock of a company; that certain offers had been made for property; and that an old stock of goods was fresh and new." Citing authorities in support thereof.

[24] Hemmer v. Cooper, 8 Allen, 334; Holbrook v. Connor, 60 Me. 578; Bishop v. Swall, 63 Me. 12; Benj. Sales, section 430, note "M"; Noething v. Wright, 72 Ill. 390; Hauk v. Brownell, 120 Ill. 161, 11 N. E. Rep. 416.

[25] Hauk v. Brownell, 120 Ill. 161, 11 N. E. Rep. 416. See also Banta v. Pullman, 47 Ill. 99; Tucker v. Downing, 76 Ill. 71.

[26] Farribault v. Sater, 13 Minn. 223.

[27] Allen v. Hart, 72 Ill. 104. See, also, Peffley v. Noland, 80 Ind. 164; McKee v. Eaton, 26 Kan. 226; Wise v. Fuller, 29 N. J. Eq. 257.

[28] Bolds v. State, 9 Ind. App. 657; Small v. Kennedy, 137 Ind. 299; Kennedy v. Richardson ., 70 Ind. 524; Cagney v. Cuson, 77 Ind. 494; Buxton v. Jones, 79 N. W. Rep. 980; Stevens v. Allen, 32 Pac. Rep., 922; Bolds v. Woods, 36 N. E. Rep., 933; Smith v. Richards, 13 Pet. (U. S.) 26, 54 Fed. Rep. 320; Griffin v. Farrier Partners, etc., 21 N. W. Rep. 553.

[29] Smith v. Richards, 13 Pet. (U.) 26; McCullen v. Scott, 24 Wis. 84.

[30] 124 Mass. 431.

ages. The case of Robbins v. Barton,[31] goes to the extreme limit on this proposition. The plaintiff therein brought an action for deceit, alleging that he relied upon certain representations made by the defendant, concerning the financial standing of another. The representation complained of was made in the form of a recommendation as follows: "I consider H. G. Gorton perfectly good for a bill of goods to the amount of $624.84. H. G. Gorton is safe." It was alleged that the foregoing representation was made by the defendant, who at the time knew that the said Gorton was wholly "irresponsible financially" and that such representation was made for the purpose of fraudulently inducing the plaintiff to make a sale of goods to his damage. The petition of the plaintiff was held sufficient to constitute a cause of action for deceit. The court said: "We think the allegations of the petition bring it within the rule stated in the Am. & Eng. Enc. of Law,[32] viz: 'If the party makes representations susceptible of knowledge in such a way as to impress upon the other party the truth of such assertion, but knows that they are false, with intent that the other party shall rely upon them, in case the other party acts upon this representation, it is fraud.'" The court also cites the following authorities:[33]

In Russell v. Clark's Ex'rs.,[34] Chief Justice Marshall said: "The question how far merchants are responsible for the character they give each other, is one of much delicacy, and great importance to the commercial world. That a fraudulent recommendation (and a recommendation known at the time to be untrue would be fraudulent), would subject the person giving it to damages sustained by the person trusting to it, seems now to be generally admitted." In the case of Pasley v. Freeman,[35] cited in Robbins v. Barton, *supra*, it is suggested that if an act in itself immoral, in its consequences injurious to another, and set in motion for the purpose of effecting injury, "be not cognizable and punishable by our laws, our system of jurisprudence is more defective than has hitherto been supposed." In the case of Upton v. Vail,[36] the following representation was made: "He is good; as good as any man in the country for that sum." The court held that while that representation involved an opinion, yet, if it was made in bad faith, and with knowledge that the party referred to was insolvent and injury resulted, recovery could be obtained. This case is cited and commented upon with approval in Hickey v. Morrell,[37] from which the foregoing statement thereof is derived.

The case of Belcher v. Costello,[38] is much more conservative than the cases just commented upon, and maintains that a representation that another is good financially and amply able to meet obligations given for the purchase price of property, is not necessarily a representation of fact, and neither could it be classified in every instance as a mere expression of an opinion. It is frequently a difficult matter to ascertain whether a statement is one of opinion or of fact and no rule can be formulated to accurately define the circumstances under which representations, either of fact or of opinion may be actionable. A great many cases are complicated with facts peculiar to themselves, and in those cases the courts are inclined to leave the facts to the jury trying the cause to determine whether fraud was intended and acted upon or not. In criminal prosecutions the question is not so vexed, and in the case of State v. Tomlin,[39] an indictment for obtaining, under false pretenses, a note at a low price, by representing that the maker was insolvent, was held good. Following the same logic is the case of State v. Montgomery;[40] and the text and citations collated in Am. & Eng. Enc. of Law.[41]

While the vendor's false representation of the value of the article which he proposes to sell is not generally actionable, yet it has been held that this immunity is not extended to a person not the vendor, or third parties. Such a person is held responsible generally for a false representation of value, "the excuse of interest, and the natural disposition

[31] 31 Pac. Rep. (Kan.) 686.
[32] Vol. 5, p. 328
[33] Wakeman v. Dalley, 51 N. Y. 27; Hazard v. Irwin, 18 Pick. 95.
[34] 7 Cranch, 69.
[35] 3 Term. R. 51.
[36] 6 Johns. 181.
[37] 7 N. E. Rep. (N. Y.) 321.
[38] 122 Mass. 188.
[39] 29 N. J. L. 13, 23.
[40] 56 Iowa, 185.
[41] Vol. 7, p. 753.

of men to overestimate their own property, not being allowed in such a case."[42] In Percival v. Harres,[43] the plaintiff brought an action for conspiracy to defraud. The evidence disclosed that one of the defendants purchased plaintiff's stock of groceries, giving certain notes in payment with the second defendant as indorser thereon, the acceptance of which notes was brought about by the representations of a third defendant. The plaintiff claimed that the third defendant made specific representations as to the financial responsibility of the indorsing defendant, "including statements not only of his real estate, but also as to his bank account and the balances then to his credit therein." The sale was hurriedly consummated and shortly thereafter, the purchaser disposed of said groceries at auction. The notes subsequently becoming due were not paid, and both the purchaser and indorser proved "financially irresponsible." The lower court directed a verdict for the defendants, and the Supreme Court of Pennsylvania on appeal held that the case should have been submitted to the jury to determine whether or not a conspiracy to defraud the plaintiff existed among the defendants.

In Redding v. Wright,[44] an action was brought for deceit in the sale of stock in a certain corporation. One of the defendants, a member of the corporation, while offering his stock for sale, falsely and fraudulently represented that the corporation was not in debt and that it was making profits averaging a specified amount. There were several defendants, members of the corporation, and it appeared that they were acting together in bringing about the purchase. It was contended by the defendants that the plaintiff had no right to reply upon the representations of the defendants in the matters, of which he could readily have acquired knowledge from other sources. The Supreme Court of Minnesota declined to sanction this contention, and among other things said: "It will be observed that the representations to which attention is directed here, were concerning matters which the plaintiff might well presume to have been within the personal knowledge of the defendants, but which the plaintiff could not learn by a cursory inspection, nor without careful inspection into the affairs of the corporation, or by information from some person who had acquired knowledge of such matters, and whose information might be relied upon as trustworthy." The court held that the representation complained of under the circumstances of that case, could not be classed as mere opinions nor as the exaggerated estimates of the vendor, and that the rule of *caveat emptor* did not apply if the jury believed that the statements were made by the defendants with knowledge of their falsity and for the purpose of defrauding the plaintiff.

The case of Hedin v. Minneapolis Medical Institute,[45] is an extraordinary one, wherein the plaintiff, being an illiterate man, physically a wreck and seriously injured in an accident, consulted the defendant, a physician and surgeon in charge of the defendant medical and surgical institute, and who represented to the plaintiff that his injuries and afflictions were curable and that the institute would undertake his treatment and positively cure him for five hundred dollars. The plaintiff paid such sum and received no benefit from the treatment, and his injuries were in fact of an incurable kind. The plaintiff succeeded in the lower court, and on appeal, the Supreme Court of Minnesota held that the plaintiff had a right to rely upon the representations, and that the jury might fairly have inferred that the defendants purposely and fraudulently took advantage of the plaintiff's illiteracy and enfeebled physical condition to represent that they could cure his afflictions, and thereby procured the sum of five hundred dollars. The theory of that case is that where parties possess special learning or knowledge upon a subject, with respect to which their opinions are given or sought, such opinions should be honestly and sincerely made and that opinions of that kind are capable of approximating the truth, and that for a false statement of them, when deception is designed, and injury has followed, an action will lie.

It is apparent from the cases catalogued and dicussed that while the general rule precludes recovery on accouut of representations as to the value of the subject-matter of a sale,

[42] Busterud v. Farrington, 31 N. W. Rep. 360; Medbury v. Watson, 6 Metc. 246.
[43] 21 Atl. Rep. 876.
[44] 51 N. W. Rep. 1056.
[45] 64 N. W. Rep. 185.

yet a great many cases occur, in which, by reason of the facts, just and good conscience compel a relaxation of the general rule and exceptions have arisen. It is impossible, however, to single out and accurately define every exception, so that every case is largely determined by the nature and character of the facts which surround it. It is to be observed from the authorities commented upon that, althought the general rule is recognized by all courts, yet the same courts are not at all reluctant to depart from its application whenever a case is presented in which the slightest coloring of fraud or unfair dealing is manifest.

WALTER J. LOTZ.

Muncie, Ind.

FORMER JEOPARDY — SHOOTING AND BURGLARY IN SAME TRANSACTION.

MANN v. COMMONWEALTH.

Court of Appeals of Kentucky, April 29, 1904.

Where defendants break into a house at night with intent to steal money, which they abstract from the householder's pocket, and on his awaking shoot him, the burglary and the shooting do not constitute a single transaction out of which two offenses cannot be carved, so as to render a conviction of the shooting a bar to a prosecution for the burglary.

HOBSON, J.: Appellants, Thomas Mann and Edward Morris, were indicted and convicted of burglary, their punishment being fixed at confinement in the penitentiary for 10 years. The proof shows that they, in company with one Charles Sanders, went from Maysville in a buggy about 10 miles to the house of John B. Farrow, or near it, and there tied their horse, and after entering the house through the window, in the nighttime, proceeded to rob Farrow by taking some money that was in his pants pocket. Some noise they made waked up Mrs. Farrow, who roused her husband, and thereupon the defendants, or one of them, shot Farrow in the arm, and also in the back. The same grand jury that found the indictment for burglary also found an indictment against them for shooting Farrow, and on this last indictment they were tried and convicted. Mann appealed to this court, and that judgment was affirmed. Mann v. Commonwealth, 79 S. W. Rep. 230. When arraigned on the charge of burglary, they pleaded the conviction under the indictment for the shooting of Farrow, in bar of the proceeding.

While the indictment on the charge of burglary contains some necessary averments as to the larceny committed by them after they entered the house, it is a charge only of burglary, the allegations as to the stealing of the money by putting Farrow in fear and shooting him being apparently only added to illustrate the felonious intent with which the defendants entered the house as charged in the indictment. The burglary was complete when the felonious entry was made, and the defendants might have been indicted and convicted therefor, although they had stolen nothing in the house, or committed no other crime after they entered it. The allegations, therefore, of the indictment, as to what they did after they entered the house, are surplusage, although the facts so alleged might be properly given in evidence before the jury, on the trial, to show the intent with which the entry was made. These averments are simply statements of evidential matter, which should have been omitted from the indictment.

Burglary is defined as "the breaking and entering in the night of another's dwelling house, with intent to commit a felony therein." 1 Bishop on Criminal Law, § 559. "If a man in the nighttime breaks into a dwelling house, intending to commit therein some act which in law is felony, he is guilty of burglary, whether he succeeds in doing what he meant or not." 1 Bishop on Criminal Law, § 437. It is insisted, however, for appellants that the defendants entered the house to steal the money, and that the entry of the house, the stealing of the money, and the shooting of Farrow were all one transaction done in pursuance of one intent, and that out of it the commonwealth cannot carve two offenses. In support of this view we are referred to a number of authorities. Thus in Fisher v. Commonwealth, 64 Ky. 211, 89 Am. Dec. 620, where the defendant by the same act and with the same intent took a horse, wagon and harness, it was held that an acquittal of stealing the horse was a bar to an indictment for the stealing of the wagon and harness, and the rule was applied that out of one transaction committed with the same intent two offenses could not be carved. The same rule was applied in Triplett v. Commonwealth, 84 Ky. 193, 1 S. W. Rep. 84, where an acquittal of the offense of burglary was held a bar to a prosecution for larceny forming part of the same transaction. The court said: "At common law, in an indictment for burglary, a count might be added for the larceny when there had been an actual taking, and it therefore resulted that an acquittal of the burglary with intent to steal constituted no bar to a prosecution for the actual theft. Without the intention to commit a felony, the mere fact of breaking would not at common law, constitute a burglary; and when the intent to steal is charged, and the party acquitted, it would seem that a subsequent indictment for grand larceny, with the same facts developed on the trial, would be placing the accused in jeopardy the second time for the same offense. The weight of authority, we are aware, is adverse to such a view of the question, but the whole reason and philosophy of the law, as well as justice to the accused, require a different ruling." In Herera v. State (Tex. Cr. App.), 34 S. W. Rep. 943, it was

held by the Texas court that a conviction for assault with intent to kill was a bar to an indictment for robbery committed in the same transaction. But none of these cases are precisely in point here. It is misleading to say that the shooting of Farrow and the burglarious entry of the house were committed in the same transaction, in the sense in which this term is used by the authorities. See 1 Bishop on Criminal Law, §1060. Thus in the Fisher Case the one act of the defendant was the taking of the horse, wagon and harness; but here there were two acts of the defendant—the burglarious entry of the house, and the shooting of Farrow in the house after this act had terminated. These are no more one transaction than if the defendants had successively shot two different persons in the same difficulty. The shooting of Farrow could not have been set out in a second part of the indictment for burglary, or joined with that charge. The robbery of the person by putting him in fear was not complete before the assault with intent to kill was committed; so, therefore, neither the Triplett Case nor the Herera Case applies. In the case before us the entry into the house was for the purpose of theft. The shooting of Farrow came about because he waked up, and was nothing more than a new offense which the commission of the offense intended induced the defendants to commit. It is no more one transaction than it would be if the defendants had set fire to the house, after robbing it, to conceal the evidence of their crime, or had shot Farrow's son as they escaped, to prevent his being a witness against them. In Teaf v. State, 24 Am. Rep. 708, two men were wounded mortally by two almost simultaneous shots fired by the defendant and another, lying in ambush. It was held that a conviction for the killing of one of the men was not a bar to an indictment for the killing of the other. In State v. Nash, 41 Am. Rep. 472, the defendant fired twice in quick succession upon a crowd of persons, wounding one at the first shot and another at the second. It was held that a conviction for the wounding of the first was not a bar to an indictment for the wounding of the second. In Jones v. State (Miss.), 6 So. Rep. 231, 14 Am. St. Rep. 570, the defendant wounded two men in the same difficulty. The conviction for one was held no bar for a prosecution for the other. To same effect are McCoy v. State, 46 Ark. 141; Augustine v. State (Tex. Cr. App.), 52 S. W. Rep. 77; Winn v. State, 82 Wis. 571, 52 N. W. Rep. 775; Greenwood v. State, 64 Ind. 250; Ashton v. State, 31 Tex. Cr. R. 482, 21 S. W. Rep. 48; Samuel v. State, 25 Tex. App. 538, 8 S. W. Rep. 656. Other cases are also collected in a note to State v. Nash, 41 Am. Rep. 475. Referring to this line of cases Mr. Bishop, in the last edition of his work on Criminal Law, § 1061, says: "Obviously, there is a difference between one volition and one transaction. And, on a view of our combined authorities, there is little room for denial that in one transaction a man may commit distinct offenses of assault or homicide upon different persons and be separately punished for each." So in American & English Encyclopedia of Law, vol. 17, p. 603, it is said: "A putting in jeopardy for one act is no bar to a prosecution for a separate and distinct act, merely because they are so closely connected in point of time that it is impossible to separate the evidence relating to them on the trial for the one of them first had." It has been held that, if a man burns a dwelling-house and thereby takes the life of one of the inmates, he cannot, after being convicted of arson be also convicted of murder; and so it has been held that if a man by the same blow wounds two men, or kills two by the same discharge of a gun, a conviction for the wounding or killing of one will bar a prosecution for the wounding or killing of the other; but on this subject the authorities are divided. Bishop's New Criminal Law, §§ 1058–1061. The ruling in the arson case is put on the ground that the force which the defendant started destroyed the house and killed the person without any further action or new impulse from him. The ruling in the cases where two persons are wounded or killed by the same act is put in part on the ground that the wounding or killing of both might be charged in one indictment, and in part that there was no new impulse or act on the part of the defendant. But in the case before us the defendant could not be prosecuted under one indictment for the burglary and the shooting of Farrow. Here there was a new volition on the part of the defendant, and a new force set in motion by him, after the burglary was complete. If he cannot be prosecuted in separate indictments for the two offenses, it results that although he committed both, one beginning after the other was completed, and being the result of a separate volition as well as a new force, the constitutional provision forbidding his twice being punished for one offense will operate to shield him from punishment for a separate and independent offense simply because it was followed in close succession by another offense which he committed.

Judgment affirmed.

NOTE.—*Identity of Offenses Arising Out of the Same Transaction as Affecting the Plea of Former Jeopardy.*—There is sometimes some confusion in stating the rule of former jeopardy in its application to offenses arising out of the same transaction. It is true that the prosecution may not carve two offenses out of the one transaction. Fisher v. Commonwealth, 64 Ky. 211; Herera v. State (Tex. Cr. App.), 34 S. W. Rep. 943. But this does not prevent the legislature from carving out of one transaction more than one offense. United States v. Harmison, Fed. Cas. No. 15,308, 3 Sawy. 556; State v. Williams, 11 S. Car. 288. An individual may, therefore, at the same time, and in the same transaction, commit two or more distinct crimes; and an acquittal of one is not a bar to an indictment for the other. State v. Standifer, 5 Port. (Ala. 1837) 323; State v. Innes, 53 Me. 536; Heat v. State, 53 Miss. 439. Thus the offenses of big-

amy and continuous cohabitation arising out of the same transaction may be separately prosecuted. Brewer v. State, 59 Ala. 101. See also bigamy and adultery arising out of the same transaction, may be tried separately. Swancoat v. State, 4 Tex. App. 105. But see *Ex parte* Nielson, 131 U. S. 176. Burglary and robbery are distinct offenses which may be separately tried. Copenhagen v. State, 15 Ga. 264. Indictment for murder of unborn child and indictments for producing abortion, although arising out of the same transaction are distinct offenses, and acquittal of one is no bar to prosecution of the other. State v. Elder, 65 Ind. 282, 32 Am. Rep. 69. But see *contra:* Lohman v. People, 1 N. Y. 379, 49 Am. Dec. 340. The same shot may justify a prosecution for malicious injury to horse and for shooting with intent to kill. State v. Horneman, 16 Kan. 452; Irvin v. State, 7 Tex. App. 78. Nor is the prosecution for adultery a bar to a prosecution for seduction under promise to marry, or for lewd cohabitation. Smith v. Commonwealth (Ky. 1895), 32 S. W. Rep. 137; Morey v. Commonwealth, 108 Mass. 433. Selling another person's property as one's own will justify a prosecution for embezzlement as well as for obtaining money under false pretenses. State v. Falkner, 39 La. Ann. 811, 2 So. Rep. 539. Embezzling cloth and materials is a separate offense from embezzling overcoats though arising in the same transaction. Commonwealth v. Clair, 89 Mass. 525. A conviction for profanity and intoxication is not a bar to a prosecution for disturbance of religious worship, although arising out of the same transaction. Ball v. State, 67 Miss. 358, 7 So. Rep. 353. So also a man may be convicted of disturbing religious worship and immediately thereafter prosecuted for shooting to kill, although both transactions rest on the same facts. State v. Ross, 72 Tenn. 442. But see State v. Townsend (Dela. 1837), 2 Har. 543, where it was held that a person could not be prosecuted for riot and disturbing religious worship by such riot. A physician may be prosecuted for malpractice on a particular patient and also on the same charge for the purpose of depriving him of the right to practice. *In re* Smith, 10 Wend. (N. Y.) 449. Swearing falsely to attachment affidavit will justify a prosecution for perjury and also for illegal procurement of attachment. State v. Williams (N. Car. 1894), Conf. Rep. 474. An indictment for seduction and one for fornication and bastardy, arising out of the same transaction, may be prosecuted separately. Dinky v. Commonwealth, 17 Pa. St. 126, 55 Am. Dec. 542. Advice given to two slaves to abscond is separate offenses as to each slave. Smith v. Commonwealth, 7 Grat. (Va.) 593.

Those authorities which hold, under the facts in each particular case, that the plea of former jeopardy was good, generally hold to the rule that if the acts alleged in the second indictment are embraced in the charge contained in the first, and have been given in evidence to procure the first conviction and increase the punishment, the first conviction is a bar to any second prosecution for those acts. State v. Lindsey, 61 N. Car. 468. Thus when one brings a file into jail to enable two prisoners to escape, he was guilty of only one offense. Hurst v. State, 86 Ala. 604, 6 So. Rep. 120, 11 Am. St. Rep. 79. An acquittal for robbery bars a prosecution for false imprisonment. Fox v. State, 50 Ark. 528, 8 S. W. Rep. 836. Two defamations of character in the same place, at the same time, do not constitute separate offenses. People v. Stephens, 79 Cal. 428, 21 Pac. Rep. 856, 4 L. R. A. 845. Breaking the peace and injuring the court house are not separate offenses. Reddy v. Commonwealth, 97 Ky. 784, 31 S. W. Rep. 730. Two statutes, each providing for a penalty against bawdy houses, cannot be separately enforced. People v. Cox, 107 Mich. 435, 65 N. W. Rep. 283. Stealing bank notes and collateral are not separate offenses. State v. Moore, 66 Mo. 372. Running a race and betting on it are not two offenses. Fiddler v. State, 26 Tenn. 508.

Same Rule as Applied to Larceny and Similar Offenses.—The principal case deals with the subject of burglary, which makes it incumbent on the annotator to examine this phase of the question a little more closely. In the first place it may be said to be well settled that a conviction in a trial for larceny is not a bar to a prosecution for burglary with intent to commit larceny. Gordon v. State, 71 Ala. 315; Bowen v. State, 106 Ala. 178, 17 So. Rep. 335; Wilson v. State, 24 Conn. 57; State v. Warner, 14 Ind. 572; People v. Parrow, 80 Mich. 567, 45 N. W. Rep. 514; State v. Hackett, 47 Minn. 425, 50 N. W. Rep. 472, 28 Am. St. Rep. 380; State v. Martin, 76 Mo. 337; Howard v. State, 8 Tex. App. 447; Loakman v. State, 32 Tex. Cr. Rep. 563, 25 S. W. Rep. 22. But see the following authorities holding to a contrary view: Triplett v. Commonwealth, 84 Ky. 193, 1 S. W. Rep. 84; State v. Cooper, 13 N. J. Law, 361, 25 Am. Dec. 490; State v. Lewis, 9 N. Car. 98, 11 Am. Dec. 741; Davis v. State, 43 Tenn. 77; State v. DeGraffenreid, 68 Tenn. 287. A conviction for stealing certain goods is a bar to a prosecution for receiving such stolen goods. United States v. Harmison, Fed. Cas. No. 15,308, 3 Sawy. 556. But an acquittal from a charge of larceny is not a bar to a subsequent prosecution for receiving stolen goods. Foster v. State, 39 Ala. 229. Petit larceny and false pretenses may be two offenses arising out of the same transaction. Dommick v. State, 40 Ala. 680. So also an acquittal on a charge of theft, because the owner of the money parted with both the possession and ownership when he handed it to defendant, is no bar to another prosecution for swindling the owner out of such money. Lewis v. State (Tex. Cr. App. 1894), 24 S. W. Rep. 906.

JETSAM AND FLOTSAM.

INSANITY AS A DEFENSE TO A TORT ACTION.

As a general rule, insane persons are liable for their torts. See Weaver v. Ward, Hob. 134. Public policy is thought to overcome the technical difficulty that since such people are often incapable of volition, the things which they do are not strictly their own acts. Since it is a queation which of two innocent estates shall suffer, putting the loss on the property of the insane defendant is thought to secure greater vigilance by his guardians, and to be desirable as protecting the public. McIntyre v. Sholty, 121 Ill. 660. It has been suggested that this rule is too strict, and that wherever the state of a man's mind is important as in negligence or malicious prosecution, insanity should be a defense. Holmes, Common Law, 109. See 10 Harv. L. Rev. 182. The same considerations of public policy, however, apply here, and it is hard to see why, if the law holds a man in spite of his inability to do otherwise it should not also hold him in spite of his inability to exercise due care or to harbor malice. In this connection the attitude of the courts toward slander and libel is interesting. In America it is considered fairly well settled, on the strength of three or four decisions and several *dicta*, that insanity is a complete defense in such an action. Bryant v. Jackson, 6 Humph. (Tenn.) 199; Horner v. Marshall's

Administratrix, 5 Munf. (Va.) 466; Gates v. Meredith, 7 Ind. 440. See Avery v. Wilson, 20 Fed. Rep. 856. In England the only authority seems to be a *dictum* that it is no defense. See Mordaunt v. Mordaunt, 39 L. J. Prob. & Matri. 57, 59. The reasons given for the American attitude are two, that malice, of which an insane mind is incapable, is a necessary ingredient of these actions, and that presumptively publications from such a source do not injure. On these grounds the Court of Appeals of Kentucky has recently added another decision to the American group. Irvine v. Gibson, 77 S. W. Rep. 1106.

It is submitted, however, that neither the English *dictum* nor the American doctrine is satisfactory. The liability should not be absolute, nor the defense complete. It is true, malice is usually regarded as essential to libel or slander, but that has come to mean merely "legal malice," which is inferred from the voluntary act. Bromage v. Prosser, 4 B. & C. 247, 253. So here again the only reason an insane person should escape is the absence of volition, and it has been seen that that is no defense under the general value. Even if actual malice were required, however, it is hard to comprehend, as has been said, why public policy may not as well dispense with this as with the necessity of volition. Of course the absence of intent and of malice is always important to prevent punitive damages.

The second reason given for the American attitude is more important. Undoubtedly there is a presumption that the vaporings of a diseased brain do not injure, yet this is not always true. The public may be ignorant of the insanity, or it may be such that the words still have some weight. See Dickinson v. Barber, 9 Mass. 225; Yeates v. Reed, 4 Blackf. (Ind.) 463. The presumption that such utterances are not damaging should be a rebuttable presumption, not an absolute one. In ordinary slander, this would leave only the usual burden on the plaintiff, but where an action is maintainable without proof of damage, as in assault, libel, and slanderous words actionable *per se*, it would do away with that exemption, and make it necessary for the plaintiff to show some actual damage before he could succeed. Only when no actual damage can be shown, should the defense be complete.—*Harvard Law Review.*

BOOK REVIEWS.

FARNHAM ON WATERS AND ON WATER-RIGHTS.

What is destined to become one of the greatest law books of the age is Henry P. Farnham's work on the subject of Waters and Water Rights which has just been issued from the press. Indeed, no man, of even ordinary ability, could work twelve years on a single work and not bring forth something of some value, or, at least, considerable interest. But, when we take into consideration, Mr. Farnham's ability and experience as associate editor of the Lawyers' Reports Annotated, we have reason to expect from twelve years' labor on the part of such a man, a book of very superior, and, indeed, of almost incomparable value.

The wonderful minuteness of preparation and almost absolute exhaustiveness which are the most prominent characteristics of this work is shown by the steps taken by the author in gathering and digesting his material. It was intended from the start to make this work complete on every branch of the subject—in effect, to close this chapter of the law at 1904, leaving nothing to be looked for, directly or inferentially connected with the subject of "waters." To that end not only the 17,000 cases here cited, but every volume of every series of reports, American and English, have been examined page by page. Every case in the slightest degree involving the question of water-rights, or which throws any light upon any branch of the subject of waters, has been brought "under the microscope." The thoroughness and minuteness in this mere preliminary work, extending over a period of twelve years, would have involved prohibitive expense were it not for the fact that it was done in connection with the annotation and editorial work in the Lawyers' Reports Annotated.

A further important characteristic of this work is the differentiation of the cases in the notes according to the facts involved and the exact decision rendered. Nothing is so discouraging to the lawyer looking up the law as to run across a general proposition in a text book to which are cited a great multitude of cases, none of which are distinguishable, compelling to wade patiently through them all until he finds those which are applicable to his case. On this feature of his work the author has the following to say in his preface: "To aid the reader as much as possible in his search for precedents, the fundamental principles have been stated, and then their application by the courts has been developed by showing the holdings in the particular cases instead of grouping them under general statements with nothing to indicate their bearing. This method of treatment has required more space than would the other, but it is believed that it will be more than justified by the saving of time and labor to those who are seeking either general principles or particular precedents." Any lawyer who has ever experienced the great satisfaction as having all the cases on his subject grouped together under the general rule and every case distinguished by a note giving its peculiar facts and circumstances, will not feel inclined to push the indictment against the author that he has padded his work to swell the price. If it takes an extra volume, that one feature alone, the edition of that volume, enhances the value of the work to a degree not measurable in dollars and cents.

We heartily recommend this work to the profession.

Printed in three volumes of almost 3,000 pages each, and published by the Lawyers' Co-operative Publishing Company, Rochester, N. Y.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCORD AND SATISFACTION—Acceptance of Check.—Acceptance of check and appropriation of proceeds, in view of existing dispute, held to amount to an accord and satisfaction.—Creighton v. Gregory, Cal., 75 Pac. Rep. 569.

2. APPEAL AND ERROR—Bill of Exceptions.—Where all the instructions are not in the record, the giving or refusal of requested instructions cannot be reviewed.—Michigan City v. Phillips, Ind., 69 N. E. Rep. 700.

3. APPEAL AND ERROR—Corporation Conducting Unauthorized Business.—The fact that a corporation is engaged in a business which it has no lawful right to carry on does not render its stockholders liable as partners for torts committed by its servants or agents in the conduct of such business.—Mandeville v. Courtwright, U. S. C. C., E. D. Pa., 126 Fed. Rep. 1007.

4. APPEAL AND ERROR—Dismissal.—A writ of error issued within a pending term of the appellate court and made returnable within the same term is void.—Ghira v. Foster, Fla., 35 So. Rep. 876.

5. APPEAL AND ERROR—Equity Case.—Appellant having at all stages of the suit insisted that it is an equity case, it will be treated as such; there being no ground for reversal.—Hendrickson v. Wallace, Mont., 75 Pac. Rep. 355.

6. APPEAL AND ERROR—Interlocutory Order.—No appeal lies from an interlocutory order dismissing a rule taken on plaintiff to return a deposition in the possession of a nonresident commissioner.—Drainage Commission of New Orleans v. Charles F. Collom & Co., La., 35 So. Rep. 918.

7. APPEAL AND ERROR—Misconduct of Juror.—Misconduct of a juror in expressing an opinion during the progress of the trial is not ground for reversal, where no prejudice resulted.—Supreme Forest of Woodmen Circle v. Stretton, Kan., 75 Pac. Rep. 472.

8. APPEAL AND ERROR — Parties. — Defendants not served with process, as to whom cause was dismissed, held not proper plaintiffs in error.—Patterson v. Morrell Hardware Co., Colo., 75 Pac. Rep. 592.

9. APPEAL AND ERROR—Record on Appeal.—Where a new trial, on the ground that the verdict is contrary to law and the evidence, is denied, and the evidence is not in the record, no question is presented.—Lusch v. Pool, Ind., 69 N. E. Rep. 687.

10. APPEAL AND ERROR—Where Record Fails to Show all the Evidence.—Where the record on appeal does not show that it contains all the evidence, no error can be reviewed arising on a question of evidence.—*In re* French & Holmes, Okla., 75 Pac. Rep. 278.

11. ATTORNEY AND CLIENT—Authority to Stipulate.—An attorney, after the termination of the term of court at which the action was tried held without authority to stipulate that his client should be bound by a proceeding in error to which the client was not a party.—Brown v. Arnold, U. S. C. C., W. D. Mo., 127 Fed. Rep. 387.

12. ATTORNEY AND CLIENT—Contract for Counsel Fees.—A contract for the employment of an attorney in contesting a will held to create a lien on the shares of the heirs, recovered through the services rendered, for the payment of the stipulated fee.—Ingersoll v. Coram, U. S. C. C., D. Mass., 127 Fed. Rep. 418.

13. ATTORNEY AND CLIENT—Disbarment.—Where, subsequent to the admission to the bar, on attorney is guilty of such conduct that he no longer possesses the qualifications necessary to admit him, he should be disbarred.—People v. Essington, Colo., 75 Pac. Rep. 894.

14. ATTORNEY AND CLIENT— Reinstatement of Disbarred Attorney.—The same authority that empowers the supreme court to disbar attorneys, gives to the court the power to reinstate them.—People v. Essington, Colo., 75 Pac. Rep. 394.

15. BANKRUPTCY—Allowance to Attorney.—The rule hat an allowance will be made to an attorney from a bankrupt estate for services rendered in insolvency proceedings in a state court, only when such services were beneficial to the general creditors, applied.—*In re* M. Zier & Co., U. S. D. C., D. Ind., 127 Fed. Rep. 399.

16. BANKRUPTCY—Assignment.—Creditors, who induce and participate in an assignment by the debtor, are estopped to allege such assignment as an act of bankruptcy, for the purpose of having the debtor adjudged an involuntary bankrupt.—Clark v. Henne & Meyer, U. S. C. C. of App., Fifth Circuit, 127 Fed. Rep. 288.

17. BANKRUPTCY—Assignment of Note.—One who holds the legal title to a note by assignment may sue the maker, though he has no beneficial interest in the proceeds.—Manley v. Park, Kan., 75 Pac. Rep. 557.

18. BANKRUPTCY—Contract with the United States.—A bankrupt's contract to furnish supplies to the government construed, and held to render him liable for breaches occurring after the contract had been terminated by the government, subsequent to his bankruptcy. *In re* Stoever, U. S. D. C., E. D. Pa., 127 Fed. Rep. 394.

19. BANKRUPTCY—Proof of Claim.—The rule is well settled that a creditor whose claim is secured or partly paid by an accommodation indorser may prove the claim to its full amount, without giving the estate the benefit of the security or part payment.—*In re* Noyes Bros., U. S. C. C. of App., First Circuit, 127 Fed. Rep. 286.

20. BANKS AND BANKING—Double Liability of Stockholder.—Where a stockholder in a national bank sold his stock to his son, and agreed to have the same transferred, but failed to do so before the bank's insolvency, the father was liable to assessment as a stockholder of the bank.—Schofield v. Twining, U. S. C. C., E. D. Pa., 127 Fed. Rep. 486.

21. BENEFIT SOCIETIES—Nonpayment of Assessment.—A fraternal benefit order held not estopped from declaring a forfeiture of a certificate for nonpayment of an assessment on the day that it was due. — Supreme Lodge Knights of Honor v. Jones, Ind., 69 N. E. Rep. 718.

22. BENEFIT SOCIETIES—Renunciation of Contract by Society.—An affidavit of defense in an action by a member of a benefit life association to enforce a rescission of his contract and to recover payments made thereunder held insufficient.—Daix v. Supreme Council A. L. H., U. S. C. C., E. D. Pa., 127 Fed. Rep. 374.

23. BENEFIT SOCIETIES—Status of Beneficiary after Death of Insured.—A beneficiary of a member of a beneficial association, after the member's death, is a creditor of the association.—Lackmann v. Supreme Council of Order of Chosen Friends, Cal., 75 Pac. Rep. 583.

24. BENEFIT SOCIETIES—Suicide of Insured. — Where a life insurance policy provided that it should be incontestible after two years from its date, and the insured committed suicide after the two years, the beneficiary was entitled to recover. — Supreme Court of Honor v. Updegraff, Kan., 75 Pac. Rep. 477.

25. BENEFIT SOCIETIES—Suspension of Delinquents.—A provision of a mutual benefit society excluding delinquents from benefits held not a forfeiture, and not illegal.—United Brotherhood of Carpenters and Joiners of America v. Dinkle, Ind., 69 N. E. Rep. 707.

26. BRIDGES—Dangerous Viaduct. — The question of the sufficiency of a barricade at a dangerous viaduct as a warning to travelers was a question of fact for the jury.—Feldkamp v. Kansas City, Kan., 75 Pac. Rep. 464.

27. BROKERS — Compensation. — Where defendant agreed to pay to plaintiff, for services, half of proceeds of sale of two claims, but they were sold with others, plaintiff held entitled to recover half of entire proceeds of sale.—Huff v. Hardwick, Colo., 75 Pac. Rep. 598.

28. BURGLARY—Non-Felonious Entry.—Under a statute defining burglary, it was immaterial that the entry was not in itself a trespass, but was committed during business hours and while the store entered was open to the public.—People v. Brittain, Cal., 75 Pac. Rep. 814.

29. BUILDING AND LOAN ASSOCIATIONS — Foreclosure of Mortgage.—Stock certificates of building and loan association, pledged to it for a loan, held not foundation of action to foreclose, and hence need not be made an exhibit.—Coppes v. Union Nat. Sav. Loan Ass'n, Ind., 69 N. E. Rep. 702.

30. BUILDING AND LOAN ASSOCIATIONS — Inequitable Contract.—The question whether the premium paid by one borrowing of a building and loan association is part of the interest held immaterial, no usury statute being violated.—Fidelity Sav. Ass'n v. Bank of Commerce, Wyo., 75 Pac. Rep. 448.

31. BUILDING AND LOAN ASSOCIATIONS — Involuntary Bankruptcy.—A building and loan association held not within the bankruptcy act of 1898, and therefore could not be adjudged an involuntary bankrupt thereunder.—*In re* New York Building Loan Banking Co., U. S. D. C., S. D. N. Y., 127 Fed. Rep. 471.

32. CANCELLATION OF INSTRUMENTS — Release Obtained by Fraud.—A receipt in full in the nature of a release, if not under seal, may be avoided at law for fraud in the consideration, and does not entitle the maker to resort to equity for its cancellation. — Such v. Bank of State of New York, U. S. C. C., S. D. N. Y., 127 Fed. Rep. 450.

33. CARRIERS — Rights of Passenger on Particular Train.—A railroad ticket held not to entitle a passenger to travel on the particular train specified therein, except on his compliance with the rules, of which he was notified, not contained in the ticket.—Ames v. Southern Pac. Co., Cal., 75 Pac. Rep. 310.

34. CLERKS OF COURTS—Fees.—A clerk of a county court provided for by Acts 1896-97, p. 802, held not entitled to compensation for keeping the minutes of the court.—Reese v. Cleburne County, Ala., 35 So. Rep. 879.

35. COLLISION—Negligent Navigation by Steamers.—A steamer held in fault for collision with the tow of a meeting tug in the night on the Hudson river on the ground that, if foggy, she was going at too high speed, and, if not, she should have seen the lights on the approaching vessels.—The Benjamin Franklin, U. S. D. C., S. D. N. Y., 127 Fed. Rep. 457.

36. COLLISION—Tugs with Tows Meeting.—A tug with two tows on a long hawser, which, after properly taking a course to starboard to pass a meeting tug with tows, straightened on her course when opposite the other tug, and only 250 or 300 feet away, was in fault for a collision between the tows.—The Alfred W. Booth, U. S. D. C., S. D. N. Y., 127 Fed. Rep. 453.

37. CONSTITUTIONAL LAW — Action Against Stockholder.—Interest upon the individual liability of a stockholder does not run until in some other manner he is charged with notice that he is to be held for a specific corporate obligation.—Manley v. Mayer, Kan., 75 Pac. Rep. 550.

38. CONSTITUTIONAL LAW—Due Course of Law.—The remedy by due course of law requires before a judicial determination affecting the rights of property, that process be issued and personally served when practicable.—Bear Lake County v. Budge, Idaho, 75 Pac. Rep. 614.

39. CONSTITUTIONAL LAW—Fine for Selling Liquor Without License.—Acts 1902, p. 106, No. 90, § 68, held not unconstitutional, because it fixes no minimum ne for the offense of selling or keeping for sale intoxicating liquors without a license.—State v. Constantino, Vt., 56 Atl. Rep. 1101.

40. CONSTITUTIONAL LAW—Ordinance Affecting Pawnshops.—An ordinance does not deny the equal protection of the law because regulating the hours of operating pawnshops, loan offices and second-hand stores only.—City of Butte v. Paltrovich, Mont., 75 Pac. Rep. 521.

41. CONTRACTS—Construction.—Qualifying words are not to be read into a contract, where they would narrow the apparent general purpose, and defeat what, but for the addition, would be both a reasonable and just result.—Ingersoll v. Coram U. S C C. D. Mass., 127 Fed. Rep. 418.

42. CONTRACTS—In Restraint of Trade.—In replevin, defense that contract under which plaintiff claimed was in restraint of trade and against public policy held untenable.—California Cured Fruit Ass'n v. Stelling, Cal., 75 Pac. Rep. 320.

43. CONTRACTS — Laches in Seeking Relief from Fraud.—Relief for fraud will not be granted to one who does not seek it properly after discovery of the fraud.—Provident Loan Trust Co. v. McIntosh, Kan., 75 Pac. Rep. 498.

44. CONTRACTS—Pledging Corporation's Credit.—The treasurer and directors of a corporation have no authority to pledge the corporation's credit for the price of goods sold to another corporation.—*In re* Prospect Worsted Mills, U. S. C. C., D. Mass., 126 Fed. Rep. 1110.

45. CONTRACTS—Right of Subcontractor Against City—Contract between city and contractor held not to give subcontractor right of action against city.—McCabe v. Rapid Transit Subway Const. Co., U. S. C. C., S. D. N. Y., 127 Fed. Rep. 465.

46. CORPORATIONS—Capacity to Sue.—Association not organized held not capable to sue, though articles are subscribed by members.—Lawrie v. Silsby, Vt., 56 Atl. Rep. 1106.

47. CORPORATIONS—Estoppel to Attack Corporate Existence.—One who has contracted with another as a corporation cannot collaterally attack the other's corporate existence.—California Cured Fruit Ass'n v. Stelling, Cal., 75 Pac. Rep. 320.

48. CORPORATIONS—Liability of Original Subscribers.—The continuing guaranty of an original subscriber to corporate stock in Nebraska is the property of the corporation, and passes to its receiver or other proper representative.—Wyman v. Bowman, U. S. C. C. of App., Eighth Circuit, 127 Fed. Rep. 257.

49. COURTS—Correction of Judgment.—The power of a court to correct its records is not lost by mere lapse of time, and the rule as to the effect of the adjournment of the term has become obsolete.—People v. Ward, Cal., 75 Pac. Rep. 806.

50. COURTS—Jurisdiction by Agreement of Parties.—Jurisdiction over defendants in an action in which judgment was rendered against them, is shown by the agreement of the parties, in the record of the action, for stay of execution.—Godfroy v. White, Ind., 69 N. E. Rep. 688.

51. COURTS—Jurisdiction of Court of Appeals.—Court of appeals held to have jurisdiction to adjudge that interest in policy had passed to insured's children, though they were not parties.—People v. Court of Appeals of Colorado, Colo., 75 Pac. Rep. 407.

52. CRIMINAL LAW—Application to Evidence.—Where a requested instruction in a prosecution for manslaughter, while correct in itself, did not fully state the law applicable to the case before the court, it was properly refused.—Roberts v. United States, U. S. C. C. of App., Fifth Circuit, 126 Fed. Rep. 897.

53. CRIMINAL LAW—Insanity as a Defense.—On issue of insanity in homicide, instructions that an insane delusion must be such as, if the facts were true, would justify the act springing from the delusion, is radically wrong.—State v. Keel, Mont., 75 Pac. Rep. 362.

54. CRIMINAL TRIAL—Absence of Judge from Courtroom.—The absence of the judge from the courtroom in a criminal case held such as to constitute it reversible error.—Graves v. People, Colo., 75 Pac. Rep. 412.

55. CRIMINAL TRIAL—Application for Separate Trial Where Jointly Indicted.—An application for separate trials of defendants jointly indicted, not made until the day set for the trial and after the state had announced ready, held too late.—Austin v. State, Ala., 35 So. Rep. 879.

56. CRIMINAL TRIAL—Duty of Supreme Court as to Examination of Instructions.—It is not the duty of the supreme court to look at instructions, refused and given at certain folios of the transcript, and certain sections of the Code, cited by counsel, in order to discover error for the purpose of reversing a case.—People v. Chutnacut, Cal., 75 Pac. Rep. 340.

57. CRIMINAL TRIAL—Errors in Instructions. — The fact that the court gave correct instructions requested by defendant does not render harmless the giving of the court on its own motion of erroneous instructions.—Harris v. People, Colo., 75 Pac. Rep. 427.

58. CRIMINAL TRIAL—Remarks of Prosecuting Attorney.—Remarks of the prosecuting attorney by way of comment on the heinousness of the crime are not objectionable.—State v. Thomas, La., 35 So. Rep. 914.

59. CRIMINAL TRIAL — Testimony Taken at Former Trial.—The requirement of the Bill of Rights that accused shall be allowed to meet the witness face to face

is complied with where his testimony at a former trial is introduced at the second trial. — State v. Nelson, Kan., 75 Pac. Rep. 505.

60. CRIMINAL TRIAL—Urging Jury to Agree. — A verdict, returned after the jury had been out for a long time and had been frequently admonished by the court, held not to represent the fair judgment of the jury.—State v. Chambers, Idaho, 75 Pac. Rep. 274.

61. DAMAGES—Medical Examination in Personal Injury Case.—In action for negligent injury to the eyes, a request for an expert physical examination in the usual manner should be granted. — Atchison, T. & S. F. Ry. Co. v. Palmore, Kan., 75 Pac. Rep. 509.

62. DESCENT AND DISTRIBUTION — Inheritance by Minor.—Estate of intestate, a minor, held to descend, under Rev. St. 1892, § 4159, as real estate acquired by purchase, to the next of kin, and not to the heirs at law of the ancestor.—McCammon v. Cooper, Ohio, 69 N. E. Rep. 658.

63. DIVORCE—Attorney's Fees.—To empower court to allow wife counsel fees for past services of attorney, necessity for such allowance must be shown. — Bordeaux v. Bordeaux, Mont., 75 Pac. Rep. 359.

64. DIVORCE — Bigamous Marriage. — Under Code §§ 1488, 4406, 4407, marriage of divorced woman held bigamous, so that she had no interest in estate of her second husband.—Barfield v. Barfield, Ala., 35 So. Rep. 884.

65. DIVORCE—Judgment.—Where, in a suit for divorce, issue was joined on defendant's cross-bill, seeking a divorce for desertion and extreme cruelty, a judgment for plaintiff could not be sustained, in the absence of findings on the issues presented in such cross-bill.—Bordeaux v. Bordeaux, Mont., 75 Pac. Rep. 524.

66. DRAINS—Cleaning and Repairing. — Burns' Rev. St. 1894, § 5643 (Horner's Rev. St. 1901, § 4284), providing for a new allotment of a drainage ditch for cleaning and repairs, has no application where no legal allotment is in existence.—Hille v. Neale, Ind., 69 N. E. Rep. 713.

67. EASEMENT — Personal Privilege not Following Deed.—Reservation of right of way in grantor's deed construed, and held to create mere personal privilege, and not assignable easement.—Ross v. McGee, Md., 56 Atl. Rep. 1128.

68. ELECTION—Contest. — An alderman, unseated by the city council, held not entitled to maintain mandamus to compel his restoration to the office.—City Council of Cripple Creek v. People, Colo., 75 Pac. Rep. 603.

69. EMINENT DOMAIN — Irrigation. — The taking of property for the purpose of obtaining water for the irrigation of a farm, to render the same productive, is a taking for a public use.—Nash v. Clark, Utah, 75 Pac. Rep. 371.

70. EQUITY—Consent of Parties Before Referring to Master.—A party to a suit in equity is entitled to the judgment of the court upon the issues raised, especially those of law; and it is not competent for the court to refer the entire decision of the case to a master without the consent of the parties.—Garinger v. Palmer, U. S. C. C. of App., Sixth Circuit, 126 Fed. Rep. 906.

71. EQUITY—Multiplicity of Actions.—A bill to collect unpaid subscriptions of nine defendants separately liable at law may be maintained on the ground that it avoids a multiplicity of actions.—Wyman v. Bowman, U. S. C. C. of App., Eighth Circuit, 127 Fed. Rep. 257.

72. ESTOPPEL—Conveyance of Timber on Homestead Entry.—Where a homestead entryman conveyed the timber on the land before he had made final proof, the grantee acquired title by estoppel as against the entryman's subsequent grantee.—Anderson v. Wilder, Miss., So. Rep. 875.

73. ESTOPPEL — Homestead. — One who pleads that and was occupied at a certain time by himself and family as a homestead held estopped to assert that such tract was at the same time the homestead of another.—Linn v. Ziegler, Kan., 75 Pac. Rep. 489.

74. EVIDENCE—Best and Secondary.—Though a card tacked to a railway tie is the best evidence of the information contained therein, as it is not likely to be preserved, very slight evidence of its loss authorizes parol proof of its contents.—Atchison, T. & S. F. Ry. Co. v. Palmore, Kan., 75 Pac. Rep. 509.

75. EVIDENCE—Capacity of Testator.—A presumption of continuance of insanity only arises from a showing of apparent "permanent" unsoundness, and an instruction stating that the establishment of unsoundness raises a presumption of continuance held too broad.—Branstrator v. Crow, Ind., 69 N. E. Rep. 668.

76. EVIDENCE—Copy of Account.—Admission of affidavit of secretary of building and loan association, showing copy of account of members from the books, held error.—Coppes v. Union Nat. Sav. Loan Assn., Ind., 69 N. E. Rep. 702.

77. EVIDENCE—Injury to Brakeman.—In an action for injuries to a brakeman by striking a switch lantern, he was properly permitted to testify as to the size and shape of a lantern on a two-throw switch.—Morisette v. Canadian Pac. Ry. Co., Vt., 56 Atl. Rep. 1102.

78. EVIDENCE—Railroad Ticket.—A railro held a receipt, and not a contract, within the rule covering the admission of parol evidence.—Ames v. Southern Pac. Co., Cal., 75 Pac. Rep. 810.

79. EVIDENCE—Tax Officials.—Courts will take judicial notice of the taxing branch of government, and that its officers are at least *de facto* such.—City of New York v. Vanderveer, 86 N. Y. Supp. 659.

80. EXCEPTIONS, BILL OF—Sufficiency of Certificate.—Statement in certificate of trial judge held to sufficiently indicate that, after signing bill of exceptions, he caused it to be filed, as required by Burns' Rev. St. 1901, § 641.—Howe v. White, Ind., 69 N. E. Rep. 684.

81. EXECUTORS AND ADMINISTRATORS—Action Against. —Under the Colorado statutes, an action cannot be maintained against the executors named in a will on a claim against the decedent prior to the time such executors have qualified and received letters testamentary.—Stratton's Independence v. Dines, U. S. C. C., D. Colo., 126 Fed. Rep. 968.

82. EXECUTORS AND ADMINISTRATORS—Conversion o Assets.—Where a foreign executrix had never filed an inventory nor an accounting of her acts as such, a personal judgment could not be rendered against her for the interests of testator's children.—Falke v. Teary, Col ., 75 Pac. Rep. 425.

83. EXECUTORS AND ADMINISTRATORS—Final Account of Administrator.—A contestant's exceptions to the final account of an administratrix held not to authorize an inquiry as to a gift by the testator to the administratrix, claimed to have been in fraud of the former's creditors.—*In re* Vance's Estate, Cal., 75 Pac. Rep. 323.

84. EXECUTORS AND ADMINISTRATORS—Pleading and Practice.—In an action against executors to enforce payment of a legacy, the omission in the complaint to allege that there was property of testator applicable to the payment of the legacy is cured by a special finding showing that fact.—Coulter v. Bradley, Ind., 69 N. E. Rep. 710.

85. EXECUTORS AND ADMINISTRATORS—Probate Homestead.—A flat building held suitable for selection as a homestead, under Civ. Code, § 1237, and hence properly set apart for the use of a testator's widow pending administration.—*In re* Levy's Estate, Cal., 75 Pac. Rep. 801.

86. EXECUTORS AND ADMINISTRATORS—Sale of Real Estate.—Plaintiff, in possession as owner, has no right to enjoin a probate sale of real estate on the ground that the succession has no title to the property.—Rapides Lumber Co. v. Hartiens, La., 35 So. Rep. 910.

87. FEDERAL COURTS—Jurisdiction of Funds in Hands of Administrator.—A federal court has jurisdiction, equally with a state court of general jurisdiction, of a suit to establish a lien on the interest of defendants in

funds belonging to the estate of a decedent and in the hands of an administrator.—Ingersoll v. Coram, U. S. C. C., S. D. N. Y., 127 Fed. Rep. 418.

88. FEDERAL COURTS—Military Service as Affecting Life Insurance.—Courts take judicial notice that under the treaty of Paris the Philippine Islands became a part of the territory of the United States and were in insurrection in the island of Mindanao in 1902.—La Rue v. Kansas Mut. Life Ins. Co., Kan., 75 Pac. Rep. 494.

89. FIRE ESCAPE—Pennsylvania Statue.—An official certificate of approval of fire escapes on a building, issued under the Pennsylvania statute, is available to a succeeding owner.—Bonbright v. Schoettler, U. S. C. C. of App., Third Circuit, 127 Fed. Rep. 320.

90. FIRE INSURANCE—Limitation Clause as Affecting Infants' Rights of Action.—A dwelling house owned by a minor 12 years old was destroyed by fire, and a policy provided that suit thereon must be brought within 12 months after the fire. A suit by the minor at majority was barred.—Mead v. Phœnix Ins. Co., Kan., 75 Pac. Rep. 475.

91. FORCIBLE ENTRY AND DETAINER—Homestead Exemptions.—Where a husband and wife occupy land belonging to him as a homestead, she is the family of the owner, within the meaning of Const. art. 15, § 9.—Cross v. Benson, Kan., 75 Pac. Rep. 558.

92. FORCIBLE ENTRY AND DETAINER—When Lies.—Forcible entry and detainer is a proper remedy for a homestead entryman whose rights have been fully determined, as against one whose claim has been canceled by the land department.—Hackney v. McKee, Okla., 75 Pac. Rep. 535.

93. FRAUD—False Representations Inducing Contract.—Relief will not be granted for false representations not shown to have been an inducement to conduct resulting in injury.—Provident Loan Trust Co. v. McIntosh, Kan., 75 Pac. Rep. 498.

94. FRAUDS, STATUTE OF — Letters as Constituting Memorandum.—Letters disclosing all the terms of a contract for the sale of stock held to constitute a sufficient memorandum to satisfy the statute of frauds.—Cooper v. Bay State Gas Co., U. S. C. C., S. D. N. Y., 127 Fed. Rep. 482.

95. FRAUDS, STATUTE OF—Sale of Real Estate.—Agreement to pay to another half of proceeds of sale of real estate held not within statute of frauds.—Huff v. Hardwick, Colo., 75 Pac. Rep. 593.

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123. LANDLORD AND TENANT—Mining Lease.—Lessees of a mine held not entitled to relief from forfeiture for failing to sink the shaft a certain distance by a certain time, because of difficulties encountered; they having delayed commencement of work. — Montrozona Gold Min. Co. v. Thatcher, Colo., 75 Pac. Rep. 595.

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129. MANDAMUS—Supreme Court.—Where a cause is remanded from the supreme court to the trial court for retrial on certain designated issues, the remedy for error of the trial court in permitting the filing of amended pleadings, injecting new questions and bringing in new parties, is not by mandamus, but appeal or writ of error.—People v. District Court of Arapahoe County, Colo., 75 Pac. Rep. 390.

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